

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

IN RE:)	Chapter 7 Case
)	Number <u>89-60237</u>
RONALD M. BRAGG)	
JULIER E. BRAGG)	
)	
Debtors)	
)	
ANNE R. MOORE, TRUSTEE)	
)	
Movant)	
)	
vs.)	FILED
)	at 4 O'clock & 07 min. P.M.
COMMERCIAL CREDIT PLAN, INC.)	Date 12-19-90
)	
Respondent)	

ORDER

Anne R. Moore, trustee in this Chapter 7 bankruptcy proceeding ("Trustee") by motion seeks an order authorizing distribution of tort settlement proceeds held by the Trustee pursuant to previous order of this court. Also before the court is the motion of Commercial Credit Plan, Inc. ("Commercial Credit"), a creditor in this Chapter 7 proceeding, seeking valuation of security and payment of secured claim from these same tort settlement proceeds. The motions were consolidated for hearing and based upon the evidence presented at hearing and briefs submitted,

this court makes the following findings of fact and conclusions of law.

On October 26, 1987 Cynthia Bragg, the daughter of the debtors in this bankruptcy proceeding, and the debtors executed note with Commercial Credit in the original principal sum of Four Thousand Nine Hundred Ten and 41/100 (\$4,910.41) Dollars. To secure the loan, Cynthia Bragg granted to Commercial Credit a first in priority security interest in her automobile, a 1983 Mercury Cougar Manufacturer's ID No. 1MEBP92F6DH606502. The security interest extended to any proceeds of the property. (Exhibit "A"). The debtors did not own any interest in the automobile. At some time subsequent to the loan transaction, Cynthia Bragg sold the automobile in question to Edward Friese, Jr. The sale was memorialized in a document which provides:

It is agreed that Cynthia Bragg will sell one 1983 bCougar to Edward Friese, Jr. for the payments. The Car will remain in her name until paid for. If at any time a payment is missed the car will return to Cynthia and all money paid before is nonreturnable. It is agreed by both parties.
S/Edward Friese, Jr.
S/Cynthia Bragg
(Exhibit "K").

On or about August 16, 1988, Cynthia Bragg was a passenger in the automobile in question being operated by Mr. Friese. The automobile was wrecked and Cynthia Bragg killed. By order of the Probate Court of Screven County, Georgia letters of

administration

on the estate of Cynthia Bragg were issued to Ronald M. Bragg, her father and debtor herein. In the debtor's application for letters of administration, he valued the decedent estate of Cynthia Bragg at Five Thousand and No/100 (\$5,000.00) Dollars (Exhibit "D"). On December 7, 1988 Ronald M. Bragg and Julier E. Bragg, debtors herein, as parents of Cynthia Bragg and Ronald M. Bragg as administrator of the estate of Cynthia Bragg sued Mr. Frieese seeking to recover damages resulting from the automobile accident in which Cynthia Bragg died. The complaint sought recovery for the debtors in their individual capacity as parents of the deceased Cynthia Bragg for the full value of the deceased's life and Mr. Bragg, in his capacity as administrator of Cynthia Bragg's estate sought recovery for the personal injury, pain and suffering inflicted upon Cynthia Bragg prior to her death as well as funeral, burial and other expenses incurred in connection with the final rites. The complaint enumerated funeral, burial and other related expenses of the decedent's estate of Four Thousand Ninety Five and 70/100 (\$4,095.70) Dollars. (Exhibit "E")

The debtors brought this Chapter 7 bankruptcy proceeding on July 14, 1989. By order dated February 6, 1990 this court authorized settlement of the tort litigation referenced above for a total settlement of all claims of both the debtors for the

wrongful death of Cynthia Bragg and the decedent's estate in the amount of Twenty One Thousand and No/100 (\$21,000.00) Dollars. The

order authorized the payment of attorneys fees in the amount of Seven Thousand and No/100 (\$7 000.00) Dollars and required that the balance of the settlement funds be remitted to the Trustee for disposition as provided by law and this court's orders with all valid liens and claims of parties in interest attaching to these settlement proceeds.

The debtors claim Nine Thousand Four Hundred Fifty and No/100 (\$9,450.00) Dollars as exempt property in this bankruptcy proceeding by virtue of their available state exemptions. Official Code of Georgia Annotated (O.C.G.A. §44-13-100 et seq.). The claim of exemption is not disputed. What is in dispute is the appropriate disposition of the balance, Four Thousand Five Hundred Fifty and No/100 (\$4,550.00) Dollars. The trustee asserts that this fund represents unencumbered assets of the debtors' bankruptcy estate being the nonexemptible portion of the wrongful death settlement. The Trustee asserts that the wrongful death cause of action was property of the bankruptcy estate as of the date of filing of the bankruptcy. See 11 U.S.C. §541(a); In re: Tidwell, 19 B.R. 846 (1982) (cause of action for wrongful death is asset of bankruptcy estate). Commercial Credit contends that the settlement included a property damage settlement for the

automobile in question; and to the extent of their allowed claim, Three Thousand Five Hundred Forty-Eight and 01/100 (\$3,548.01) Dollars (Exhibit "A"), the settlement proceeds represent proceeds of its collateral subject to

its security interest and should be paid to it in satisfaction of its secured claim with the balance administered by the Trustee. Four Thousand Five Hundred Fifty and No/100 (\$4,550.00) Dollars is unencumbered assets of the estate of Cynthia Bragg, deceased and are to administered in accordance with the laws of intestate succession of the State of Georgia (O.C.G.A. §53-4-1 et seq.) by Ronald Bragg as administrator of the deceased's estate. Commercial Credit's reliance upon the provisions of O.C.G.A. §40-3-11 is misplaced.¹ The "except . . . as between the parties" language of O.C.G.A. §40-3-11(d) as well as clear state law precedence establishes that at the time of the automobile accident the motor vehicle was the property of Mr. Friese.

Unless otherwise explicitly agreed title

¹O.C.G.A. §40-3-11 provides in pertinent part:

(d) Except . . . as between the parties, a transfer by an owner is not effective until the provisions of this section . . . have been complied with and no purchaser or transferee shall acquire any right, title, or interest in and to a vehicle purchased by him unless and until he shall obtain from transferee the certificate of title therefore, duly transferred in accordance with the provisions of this section.

passes to the buyer at the time and place which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of security interest and even though a document of title is to be delivered at a different time or place . . . ' Code Ann. §109A-2-401(2) [now O.C.G.A. §11-2-401(2)]. For an application of this principle to the transfer of title to a motor vehicle, see Canal

Ins. Co. v. P & J Truck Lines, 145 Ga. App. 545(2), 244 S.E.2d 81.

Stone v. Nolan, 171 Ga. App. 644, 320 S.E.2d 781, 783 (1984), [quoting American Mut. Fire Ins. Co. v. Cotton States Mut. Ins. Co. 149 Ga. App. 280, 282, 253 S.E.2d 825 (1979)].

As between Mr. Friese and the deceased Cynthia Bragg, the bill of sale and transfer of the possession of the automobile was, as in Stone supra, a transfer of ownership in accordance with O.C.G.A. §11-2-401(2). As the deceased no longer owned the automobile, no portion of any property damage settlement in the tort settlement could have been for the automobile. Therefore, as no portion of the fund represented payment for the automobile, no proceeds of Commercial Credit's collateral existed upon which its security interest could attach. Commercial Credit retained a security interest in the automobile but not in the tort settlement between the debtors in this bankruptcy proceeding on their wrongful death cause of action nor the settlement of the Cynthia Bragg's estate's cause of action brought by Mr. Bragg in his capacity as administrator. Commercial Credit was and remains an unsecured

creditor in this bankruptcy proceeding.

The security interest of Commercial Credit did not attach to the proceeds of the tort settlement. However, the remaining nonexempt proceeds of this settlement are not property of the bankruptcy estate to be administered by the Trustee. The Trustee's

petition to approve settlement resulted in the settlement of not only the prepetition cause of action held by the debtors in this bankruptcy proceeding, the wrongful death action, which is property of the bankruptcy estate, but also the cause of action held by the decedent estate of Cynthia Bragg brought by her administrator, Ronald M. Bragg. The settlement approved by this court did not apportion the proceeds between the various causes of action.

In view of the competing interests of the debtors' bankruptcy estate as administered by the Trustee and the decedent estate of Cynthia Bragg as administered by Ronald Bragg, it falls upon this court to make proper allocation. No party in interest contests that Nine Thousand Four Hundred Fifty and No/100 (\$9,450.00) Dollars of the settlement, represents the debtors' exemptible portion of the wrongful death cause of action. Remaining for this court to determine is the allocation of the balance of the settlement, Four Thousand Five Hundred Fifty and No/100 (\$4,550.00) Dollars, between the wrongful death cause of action, as property of the bankruptcy estate, and the damage claim

of the decedent estate of Cynthia Bragg. The cause of action brought by Ronald Bragg in his capacity as administrator of the decedent estate of Cynthia Bragg was for the pain and suffering experienced by Cynthia Bragg prior to her death resulting from the automobile accident and her funeral, burial and other expenses connected with her final rites. Recovery for pain and suffering experienced by the deceased prior to her death is in the form of general damages which Georgia law (O.C.G.A. §51-12-2) presumes will flow from a tortuous act and are recoverable without specific proof as to an amount. Recovery for the funeral, burial and related expenses are special damages which actually flow from the tortuous act and require specific proof. In the complaint which is the basis for the settlement, Ronald Bragg in his capacity as administrator claimed Four Thousand Ninety-Five and No/100 (\$4,095.00) Dollars as funeral expenses. The balance of the settlement Four Hundred Fifty-Five and No/100 (\$455.00) Dollars is allocated to general damages flowing from the pain and suffering endured by Cynthia Bragg prior to her death.

No party in interest having objected to the distribution of Nine Thousand Four Hundred Fifty and No/100 (\$9,450.00) Dollars from the settlement proceeds as exempt property of the debtors, the Trustee is hereby ORDERED to disburse this sum to Ronald M. Bragg and Julier E. Bragg. This-court having determined that the balance of the settlement proceeds, Four Thousand Five Hundred Fifty and No/100 (\$4,550.00) represents settlement of the causes of action available to the estate of Cynthia Bragg, and not

property of this bankruptcy estate, the Trustee is ORDERED to disburse Four Thousand Five Hundred Fifty and No/100 (\$4,550.00) Dollars to Ronald M. Bragg in his capacity as administrator of the estate of Cynthia Bragg with the proceeds to be administered in accordance with applicable State law. In the event that the administration of the estate of Cynthia

Bragg results in any proceeds to be disbursed to the debtors as heirs at law of the deceased, such proceeds shall be disbursed to Anne R. Moore, as Trustee in this bankruptcy proceeding.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 19th day of December, 1990.